United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1168, 1283, 1348

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 74-1168

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 74-1283

WESTINGHOUSE BROADCASTING CO.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

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No. 74-1348

WARNER BROTHERS AND COLUMBIA PICTURES,

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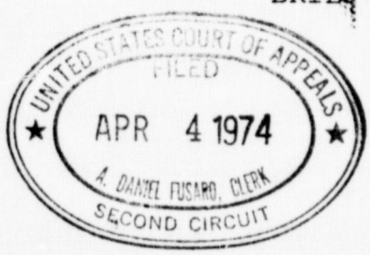
BRIEF FOR THE UNITED STATES OF AMERICA



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The Department of Justice urged the Federal Communications Commission to adopt the prime time access rule which this court

sustained in Mt. Mansfield Television, Inc. v. FCC, 442 F. 2nd, 470, C.A. 2). The instant decision by the Commission, which significantly modified that rule, represents, in our view, a serious weakening of its basic purpose: to correct the serious threat to diversity in broadcasting represented by the high degree of concentration of programming control in the three major networks. Network Television Broadcasting, 23 FCC 2nd 382, 396.

We recognize, of course, that in adopting the original prime time access rule, and in subsequently modifying it, the Commission was not conducting an antitrust case. The Commission has, as part of its public interest responsibilities under the Communications Act, an obligation to take the nation's competitive policy into account (see e.g., Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86, 94; National Broadcasting Co. v. United States, 319 U.S. 190, 218; Mt. Mansfield Television, Inc. v. FCC, supra). This responsibility, however, is not the equivalent of independent antitrust proceedings. Such proceedings are aimed at preserving diversity in broadcasting, without government interference, by assuring that programs will be produced and sold in a market free of private restraints. Although the Commission may have broad and important responsibilities with respect to the regulation of network broadcasting, those responsibilities do not preclude the

operation of the antitrust laws. United States v. Radio Corporation of America, 358 U.S. 334; cf. Otter Tail Power Co. v. United States, 410 U.S. 366; Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747.

Whatever the Commission does within the scope of its own statutory responsibilities, therefore, the antitrust laws may be independently enforced in antitrust proceedings against precisely the kind of anticompetitive market structure which led the Commission initially to adopt the prime time access rule. To this end, the United States has initiated its own suits against the networks. United States v. National Broadcasting Co., Inc., et al., DCD Cal., Civil No. 72-819-RJK, United States v. Columbia Broadcasting System, DCD Cal., Civil No. 72-820-RJK, United States v. American Broadcasting Co., DCD Cal., 72-821-RJK.

The pendency of the government's antitrust suits, however, is neither a shield beneath which the Commission's original rule may be sheltered from modification, nor a sword by which the conflicting interests opposed to the rule may strike it down. Whatever the Commission's modifications may be, the only question before this court is whether the Commission has remained within its statutory powers, has considered the relevant factors in the complex equation it must solve, and has made a rational decision.

Rule-making requires no more. United States v. Allegheny-Ludlum Steel, 406 U.S. 742; United States v. Florida East Coast Railroad, 410 U.S. 224. Under these criteria, regulations such as those involved here, are within the agency's power so long as "reasonably related to the purpose of the enabling legislation." Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369. "That some other remedial provision might be preferable is irrelevant . . . . where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." Id. at 371-372.

The several petitioners each advance well-stated arguments that the Commission's decision to modify the rules is not rationally supported. Those who seek outright repeal of the rule point to the reasons adopted by the Commission for modifying it as evidence that it should not be continued. Those who challenge the modification of the rule point to the Commission's reasons for refusing to repeal it, and say that those reasons make its modifications irrational. While we believe the Commission has weakened its rule from a competitive point of view, the responsibility for formulation of regulations under the Communications Act belongs to the Commission alone. It must strike the balance among the varied factors bearing on the operation of the Commission's original rule.

Among these factors are the adequacy of the rule's initial test period; the practical difficulties encountered in administering the rule; the extent to which program quality may, within the First Amendment, be considered by the Commission instead of being left to the market-place; and the date when modifications may become effective with the least disruption to future programming consistent with the rule's purpose. These are matters initially for assessment by the Commission, and as to which it enjoys the benefit of a strong presumption of regularity.

Viewing the matter, as we must, solely in the context of the Commission's rule-making responsibilities, we conclude that the agency acted within its rule-making and policy-making responsibilities.

Its decision was a compromise. But given the wide range of conflicting concerns bearing on that decision, we think that its compromise was the very essence of the policy-making responsibility assigned the Commission by Congress. In this connection, however, we emphasize that the Commission through its regulatory powers, serves only as a first line of defense against anticompetitive injury to the public interest in broadcasting. Gulf States Utilities v. FPC, supra, 411 U.S. at 760. The more precisely focused anti-trust remedy was intended by Congress to function as a separate and independent safeguard. It applies with full force to network dominance of programming. United States v. Radio Corporation, supra.

CONCLUSION

The Commission's order modifying its prime time access rule, should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 1974, I caused to be served by United States mail upon counsel listed below copies of the Brief for the United States of America and Motion For Leave To File A Consolidated Brief.

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